

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SER:DEM:WAS:TL-N-5480-99

ARPerogoy

date: DEC 21 1999

to: Chief, Examination Division, Delaware-Maryland District

from: Associate District Counsel, Delaware-Maryland District, Washington,
D.C.

subject: [REDACTED]
Statutory Notice of Deficiency for [REDACTED] Tax Year

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

POST-REVIEW STATEMENT

This advice is being coordinated and reviewed by Chief Counsel at the National Office. This memorandum is not to be relied upon until that review is complete. We will advise you when that occurs.

ISSUES AND CONCLUSIONS

Issue. 6213.06-00. Will Counsel defend the Notice of Deficiency issued to the [REDACTED] for their [REDACTED] tax year as timely based on the Service's position that the [REDACTED] request

for an automatic extension of time to file was not valid because the [REDACTED] failed to "properly estimate" the tax due?

, , (b)(5)(AC), (b)(7)a

FACTS

The Service issued a Notice of Deficiency ("Notice") for the [REDACTED] [REDACTED] personal income taxes on [REDACTED]. The deficiency amount is \$ [REDACTED] plus a \$ 6662 penalty of \$ [REDACTED]. The Notice also disallowed a claim for refund with respect to foreign currency losses in the amount of \$ [REDACTED]. The Service had determined that the period of limitations for assessment expired on [REDACTED], because the date received stamp on the tax return was [REDACTED], and there was no envelope attached to the return from which a mailing date could be determined.


The [REDACTED] now allege that the period of limitations expired on [REDACTED], and thus, the Notice is late. The [REDACTED] timely requested on Form 4868 an automatic extension of time to file their [REDACTED] personal income tax return until [REDACTED]. The Form 4868 showed a total tax liability estimate of \$ [REDACTED], and showed total estimated tax payments previously made of \$ [REDACTED]. No additional payment was submitted with the extension request. The [REDACTED] subsequently filed a timely second request on Form 2688, which was apparently granted, until [REDACTED]. The [REDACTED] allege that their [REDACTED] Form 1040 was filed by certified mail on [REDACTED], and they have produced a copy of a certified mailing receipt (PS Form 3800) dated [REDACTED], and a copy of the certified return receipt (PS Form 3811) dated by the PSC on [REDACTED]. Copies of the extension requests and the certified mailing receipt and return receipt are attached. The total tax shown on the Form 1040 was \$ [REDACTED], with an amount owed of \$ [REDACTED] and an estimated tax penalty computed by the taxpayer of \$ [REDACTED]. A copy of the relevant page of the [REDACTED] return is attached. A late payment penalty was assessed but abated later. The Service has been unable to retrieve the file to determine why it was abated.

The Examination Division has concluded that the automatic extension is invalid because the [REDACTED] failed to properly estimate the taxes owed on their return, citing cases such as Crocker v. Commissioner, 92 T.C. 899 (1989). Thus, it is also concluded that the Notice was issued timely.

DISCUSSION

The issue of the timeliness of the Notice dated [REDACTED], in this case depends on the application of I.R.C. § 7502. If the [REDACTED] return is considered timely mailed on [REDACTED], then the period of limitations runs three years from the mailing date and expired on [REDACTED] before the Notice was issued. However, if the return mailed on [REDACTED], is untimely for some reason, such as the extension of time to file is invalid, then the period of limitations runs three years from the receipt date on the return of [REDACTED] and expired on [REDACTED], after the Notice was issued. In other words under I.R.C. § 7502 timely mailed is timely filed applies only if the mailing is timely. Emmons v. Commissioner, 92 T.C. 342 (1989).


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an unpublished decision of the Ninth Circuit called United States v. Shildmyer, Docket No. 96-30222 (April 24, 1997), 79 AFTR 2nd ¶ 97-901 (9th Cir. 1997), discussed whether the period of limitations for assessing a criminal liability for filing a false tax return under § 7206(1) began to run on the date of a mailed tax return or its received date. The government argued that the Form 4868 was invalid because the

estimate was not a bona fide and reasonable estimate, and thus, the criminal statute began to run on the date the false return was received and not when it was mailed. While not directly addressing this issue, the Court accepted this legal argument and remanded the case to the District Court for consideration by the jury of the factual question of whether the estimate was properly made. Thus, there is some judicial authority for the proposition that the period of limitations for a civil tax liability also begins to run from the date received of a tax return considered to be filed late as a result of an extension to file held to be invalid.

The cases cited by the Examination Division provide guidance of the standards of a "proper estimate" under Treas. Reg. § 1.6081-4(a)(4). The issue is a factual one highly dependent on the facts and circumstances of each case. In Crocker, the Court stated that in order to be treated as having "properly estimated" his tax liability, the taxpayer must "make a bona fide and reasonable attempt to locate, gather, and consult information which will enable him to make a proper estimate of his tax liability." The Court cautioned that the estimate is an estimate and that the taxpayer need not assemble an exact picture of his income, and a mere comparison of the estimated tax liability with the "true" tax liability will not reveal whether the estimate was proper. In Crocker, the petitioner failed to keep good records of his income, lost Forms 1099 received and failed to contact the payers for replacement Forms 1099. The Court held that the extensions were invalid because the tax was not "properly estimated," as the petitioner failed to "make even a minimal effort to consult or secure the information necessary to make a bona fide and reasonable estimate."

The invalidation of the automatic extension on Form 4868 also means that the second extension on Form 2688, even if granted by the Commissioner, is also invalid. Further, the relevant inquiry as to the "true" tax liability also considers the deficiency amount (assuming it is upheld) and is not limited to the amount shown on the filed return. Crocker, supra; Harrison v. Commissioner, T.C. Memo. 1998-417. The Court will compare the relative amounts of the estimated tax and the true tax. The Court will also analyze what specific information is necessary for an estimate given the nature of the taxpayer's income activities to determine whether the estimate is reasonable. For example, lacking Form K-1 information may in some circumstances support an estimate being reasonable and may not in other circumstances. See Arnaiz v. Commissioner, T.C. Memo. 1992-729.

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Please contact Alan R. Peregoy, [REDACTED], if you wish to discuss this further.


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Attachments: as stated